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Land Use Manager

Regulating Sexually Oriented Businesses

Municipalities cannot prohibit sexually oriented businesses from locating within their community. However, the United States Supreme Court has ruled that cities and towns can enact zoning requirements regulating such uses provided the regulations: (1) further a substantial public purpose; (2) do not eliminate reasonable alternative locations; and, (3) are not enacted to prevent sexually explicit free speech.

DEPARTMENT OF HOUSING & COMMUNITY DEVELOPMENT

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The United States Supreme Court upheld the validity of adult use regulations in Young v. American Mini Theaters, Inc., 427 U.S. 50 (1976) and City of Renton v. Playtime Theaters, Inc., 475 U.S. 41 (1986).

In Young, the operators of two adult motion picture theaters challenged a 1972 Detroit zoning ordinance. The ordinance prohibited an adult theater from locating within 1,000 feet of any two other "regulated uses" or within 500 feet of a residential area. In addition to adult theaters, the term "regulated uses" included adult bookstores, cabarets, bars, and hotels. The ordinance defined an adult theater as a theater that presented material with an emphasis on matter depicting "Specified Sexual Activities" or "Specified Anatomical Areas." Both these terms were defined in the ordinance. The 1972 zoning ordinance amended an "Anti-Skid Row Ordinance" which had been adopted ten years earlier by the city. At that time, the Detroit common council had made a finding that some uses of property were especially injurious to a neighborhood when concentrated in limited areas. The decision to add adult motion picture theaters and adult bookstores to the list of regulated uses was, in part, a

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response to the significant growth in the number of such establishments. A police department memorandum stated that since 1967 there had been an increase in the number of adult theaters in Detroit from 2 to 25, and a comparable increase in the number of adult bookstores and other adult-type businesses. In the opinion of urban planners and real estate experts who supported the ordinance, the location of sexually oriented businesses in the same neighborhood "tends to attract an undesirable quantity and quality of transients, adversely affects property values, causes an increase in crime, especially prostitution, and encourages residents and businesses to move elsewhere."

Although five members of the court did not agree on a single rationale for its decision, the court held that Detroit's zoning ordinance did not violate the First and Fourteenth Amendments. The court noted that the First Amendment will not tolerate the total suppression of erotic materials and that the outcome would have been quite different if the ordinance had the effect of suppressing, or greatly restricting, access to lawful speech. It was also important to the court that: (1) there was a factual basis for the city's conclusion that a concentration of adult movie theaters causes areas to deteriorate and become a focus of crime; and, (2) that the zoning ordinance was aimed at eliminating these harmful secondary effects and was not an attempt to prevent the dissemination of "offensive" speech.

In May of 1980, the mayor of Renton suggested to the Renton city council that it consider enacting a zoning ordinance dealing with adult entertainment uses. No such uses existed in the city at that time. The city council referred the matter to the city's planning and development committee which reviewed the experiences of Seattle and other cities. The committee also received a report from the city's attorney advising them as to developments in other cities. The city council, acting on the basis of the planning and development committee's recommendations, enacted a zoning ordinance prohibiting any adult motion picture theater from locating within 1,000 feet of any residential zone, single or multiple-family dwelling, church, park, or school.

In describing Renton's zoning ordinance as a time, place, and manner regulation, the court noted that these so-called "content-neutral" regulations are acceptable so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication.

The court found that the ordinance furthered substantial governmental interests as it was designed to prevent crime, protect the city's retail trade, maintain property values, and generally protect and preserve the quality of the city's neighborhoods, commercial districts, and the quality of urban life. The court also found that it was not necessary for a municipality to conduct new studies or produce evidence independent of that already generated by other communities, so long as whatever information the municipality relies upon is relevant to the problem that the municipality is attempting to address. The record in this case revealed that Renton had relied heavily on the experience and studies produced by the city of Seattle. In Seattle, as in Renton, the adult theater zoning ordinance was aimed at preventing the secondary effects caused by the presence of even one such theater in a given neighborhood.

The Renton ordinance left 520 acres available for adult theater sites. A substantial part of the 520 acres, which was about five percent of the city's total land area, was already occupied by existing businesses or not available for sale or lease. The court found that the ordinance did not effectively deny adult theater owners a reasonable opportunity to open an adult theater and that adult theater owners must fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees. The court noted that the First Amendment does not require a municipality to ensure that adult uses will be able to obtain sites at bargain prices, but it does require that a municipality refrain from effectively denying adult uses from locating in the community.

Justice Rehnquist, writing for the majority, concluded:

> In sum, we find that the Renton ordinance represents a valid governmental response to the "admittedly serious problems" created by adult theaters. Renton has not used "the power to zone as a pretext for suppressing expression," but rather has sought to make some areas available for adult theaters and their patrons, while at the same time preserving the quality of life in the community at large by preventing those theaters from locating in other areas. This, after all, is the essence of zoning.

Here in Massachusetts, communities have been prevented from enforcing their zoning regulations to prohibit an adult use from opening where they have: (1) severely limited the ability for an adult use to locate in the community; (2) failed to identify the secondary effects of adult uses and the substantial governmental interest; or, (3) failed to establish a public record explaining the intent and purpose of the adult regulations.

In T & D Video, Inc. v. Revere 423 Mass. 577 (1996), the Massachusetts Supreme Court upheld a Superior Court preliminary injunction prohibiting the city from enforcing its adult entertainment ordinance. The city was trying to prevent an adult video store from opening. The judge in Superior Court found that Revere made no attempt to justify its adult entertainment ordinance. There was no reference to the secondary effects of sexually oriented businesses while the ordinance was under consideration by the city council. The ordinance did not contain a preamble explaining the intent or purpose of the regulations. The legislative record was barren. Revere's only effort at defining the purpose and intent of the ordinance came during the litigation which was well after the enactment of the regulations.

The Superior Court judge was not satisfied that the ordinance met the requirement that alternative avenues of communication not be unreasonably limited by the city. She noted that the ordinance restricted adult uses to a small area within an industrial district which all but foreclosed the possibility of opening and operating any regulated adult use in the city of Revere. The Supreme Court upheld the judge's conclusion that the Revere zoning regulations denied T & D Video reasonable alternative avenues of communication.

Recently, in A.F.M., Limited v. City of Medford, 428 Mass. 1020 (1999), the Massachusetts Supreme Court upheld a Superior Court preliminary injunction prohibiting the city of Medford from enforcing its adult regulations to prevent an adult book and video store from operating in the city. Assuming that the adult regulations adopted by the city were constitutionally proper, the court held that the preliminary injunction was properly entered because the city failed to show that A.F.M. (Airborne for Men) had been left with reasonable alternative means of communication.

Airborne for Men applied for a special permit to operate an adult book and video store. The proposed business would have been located within 750 feet of a residential district which was prohibited by the zoning ordinance. The special permit was denied by the city council. The city's zoning scheme confined adult businesses to 0.11 percent of the city's total developable land. This area consisted of one small city block which was completely occupied by a bank, an outdoor storage area and a car wash. The city did not present any information explaining why it was reasonable to restrict adult businesses to such a small area. As in the T.D. Video case, the court found that the zoning regulations denied Airborne reasonable alternative avenues of communication.

Public Hearing Notices

MGL, Chapter 40A, Section 5 requires that the Department of Housing and Community Development be notified of any public hearing scheduled by a planning board or city council concerning any proposed amendment to a local zoning bylaw or ordinance. In order for our records to show that we have been properly notified, such notices must be received by the Department prior to the scheduled hearing.

To be assured that our records will reflect proper notice, please mail all public hearing notices to the following address:

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One Congress Street - 10th floor
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The Zoning Act also authorizes the Department to grant waivers of notice when a planning board or city council fails to give proper notice to the Department. Pursuant to the statute, a waiver of notice can only be granted prior to the town meeting or city council action on the proposed zoning change. We are frequently asked to grant a waiver of notice after the zoning proposal has been enacted by the community. In such situations, we will review the zoning proposal and will respond to the community in writing if we have no objections to the zoning amendment adopted by the community.

Citizen Planner Training

Two training programs for local land use officials will be conducted in April at four locations across the state by the Citizen Planner Training Collaborative. The two training programs being offered are "The Comprehensive Master Plan" and "Non-Conforming Structures and Uses. The Programs will be held at the following locations:

The Comprehensive Master Plan

Danvers: North Shore Community College - April 8, 1999
South Deerfield: Frontier Regional School - April 14, 1999

Non-Conforming Structures and Uses

South Yarmouth: Senior Center - April 12, 1999
Gardner: Mt. Wachusett Community College - April 22, 1999

The training sessions will be held at 7:30 p.m. and the cost for each workshop is $20. For more information and to register, contact the Massachusetts Federation of Planning & Appeals Boards at (781) 246-4681.

Subdivision Plans and Zoning

A planning board may adopt a regulation requiring subdivision plans to be in compliance with local zoning requirements. Even in the absence of any express provision in the planning board's regulations requiring compliance with local zoning, the court, in Beale v. Planning Board of Rockland, 423 Mass. 690 (1996), held that a planning board can disapprove a subdivision plan which does not conform to the provisions of the zoning bylaw.

Beale owned a 56 acre parcel of land. Most of the parcel was located in the Town of Hingham. Beale proposed to construct a 457,000 square foot retail shopping center in Hingham and use a 400-foot strip of land in Rockland for an access road to the shopping center. The Rockland strip was located in an industrial zone which did not allow retail sales. The planning board gave five reasons for denying the plan. One reason was that the proposed use of the private way to provide access to the retail shopping center in the town of Hingham violated the provisions of the Rockland zoning bylaw because retail uses are prohibited in the industrial zoning district.

It is well established that the use of land in one zoning district for an access road is prohibited where the road would provide access to uses that would themselves be barred if

they were to be located in the same district as the access roadway. Where a parcel of land lies in two communities, each community may apply its zoning law to the portion that lies within its boundaries. The court held that the planning board had the authority to disapprove the plan on the basis of the zoning violation, even though the planning board's rules and regulations did not contain a specific provision requiring compliance with the zoning bylaw.

Beale challenged this conclusion arguing that Section 81U of the Subdivision Control Law allows a planning board to disapprove a plan only when the plan fails to comply with the board's own rules and regulations or with the recommendations of the board of health. However, the SJC noted that Section 81U must be read in conjunction with other provisions of the Subdivision Control Law, most notably Section 81M which specifies the purposes of the law. Section 81M provides in part that "the powers of a planning board ... shall be exercised with due regard for ... insuring compliance with the applicable zoning ordinances or by-laws." The court found that this statement of purpose provides a basis for disapproval of a subdivision plan separate from any noncompliance with the planning board's subdivision rules and regulations or board of health recommendations.

Delaying ANR Endorsement

Section 81P of the Subdivision Control Law specifies that if a planning board determines that a plan does not require approval under the Subdivision Control Law, "it shall forthwith, without a public hearing endorse ... [the plan] 'approval under the subdivision control law not required' or words of similar import ... . Such endorsement shall not be withheld unless such plan shows a subdivision."

In Bisson v. Planning Board of Dover, 43 Mass. App. Ct. 504 (1997), a landowner submitted a plan to the planning board which did not show a subdivision. The planning board deferred endorsing the plan until town meeting amended the zoning bylaw increasing the minimum lot frontage requirement. After town meeting vote, the planning board denied ANR endorsement because the lots shown on the plan did not meet the new frontage requirement. The court held that the term "forthwith" in Section 81P compels immediate action after a planning board determines that a plan does not show a subdivision. The planning board did not have the authority to delay its determination when the plan clearly did not show a subdivision.

Also, once a planning board has endorsed an ANR plan, it cannot at a later date change its mind and rescind ANR endorsement. In Cassani v. Planning Board of Hull, 1 Mass. App. Ct. 451 (1973), the court held that the authority of a planning board to modify, amend or rescind plans under Section 81W of the Subdivision Control Law does not apply to ANR plans.

Looking at the Land Court

New Agricultural Structure & New Child Care Facility Subject to Special Permit

In Prime v. Zoning Board of Appeals of Norwell, 42 Mass. App. Ct. 796 (1997), the Massachusetts Appeals Court decided that the Zoning Act prohibits a community from requiring a special permit for the expansion or reconstruction of existing agricultural structures but allows a community to require that new agricultural structures obtain a special permit. The first paragraph of Chapter 40A, Section 3 provides that:

> no ... zoning ordinance or by-law shall ... prohibit, unreasonably regulate or require a special permit for the use of land for the primary purpose of agricultural ... nor prohibit, or unreasonably regulate, or require a special permit for the use, expansion or reconstruction of *existing structures* thereon for the primary purpose of agriculture ... .

The court cautioned communities that special permit requirements may not be imposed unreasonably and in a manner designed to prohibit the operation of the agricultural use.

In Campbell v. Town of Weymouth, Misc. Case No. 237269 (1998); 6 LCR 276 (1998), Judge Green of the Land Court concluded that the construction of a new structure for a child care facility can also be subject to special permit review. The third paragraph of Chapter 40A, Section 3 provides that:

> No zoning ordinance or bylaw ... shall prohibit, or require a special permit for, the use of land or structures, or the expansion of *existing structures*, for the primary, accessory or incidental purpose of operating a child care facility ... .

Judge Green observed that the protections afforded child care facilities are similar to the protections afforded agricultural uses and concluded that a zoning bylaw may require a special permit for the construction of a new structure to be used as a child care facility. However, as was noted in the Prime decision, the special permit process may not be imposed unreasonably or in a manner designed to prohibit the operation of a child care facility.

The child care facility was proposed to be located in a floodplain. The board of appeals denied the special permit because the "area was subject to flooding and a day care center for fifty-three children in the floodplain is hazardous to the well being of those children and not an appropriate location." Judge Green annulled the board's decision. He found that the board had denied the special permit because it would have preferred a different use of the locus than the proposed child care facility. Rather than imposing reasonable conditions on the proposed facility, the board's denial of the special permit operated to nullify the protections afforded child care facilities under the Zoning Act. Judge Green remanded the matter to the board of appeals for further proceedings consistent with his decision.

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